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Supreme Court, U.S.
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No. 02-1287

In The
Supreme Court of the United States

GRIFFIN TELEVISON OKC, L.L.C., and
CHRIS HALSNE,

Petitioners,

v.

H.L. MITCHELL, D.V.M.,

Respondent.

On Petition For Writ Of Certiorari
To The Court Of Civil Appeals
Of The State Of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DOUGLAS E. STALL
LATHAM, STALL, WAGNER,
STEELE & LEHMAN
Boulder Towers
1437 South Boulder,
Suite 820
Tulsa, Oklahoma 74119
Tel. (918) 382-7523

CLYDE A. MUCHMORE
Counsel of Record
MARY H. TOLBERT
CROWE & DUNLEVY
A PROFESSIONAL CORPORATION
20 North Broadway,
Suite 1800
Oklahoma City, Oklahoma
73102
Tel. (405) 235-7734

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners ask this Court to grant certiorari to review three questions concerning the Oklahoma Court of Civil Appeals' actual malice determination, asserting that these issues are dispositive of this case. Petitioners are simply wrong. In a private figure defamation action such as this, proof of actual malice is necessary only to permit an award of presumed or punitive damages. The Oklahoma Court of Appeals has already held, however, on state law grounds, that presumed damages are not permitted in this case, and it is unclear whether the jury's relatively modest award of punitive damages will be reinstated or vacated on remand. Thus the questions proposed by Petitioners are not only not dispositive of this litigation, they are largely moot. For these and other reasons discussed below, the Petition for a Writ of Certiorari should be denied.

STATEMENT OF THE CASE

In 1998, Petitioners Chris Halsne ("Halsne") and Griffin Television, L.L.C. ("KWTV"), published a series of seven television broadcasts regarding Respondent Howard L. Mitchell ("Mitchell"), a Bristow, Oklahoma, veterinarian. The facts surrounding these broadcasts were established below and are as follows:[1]

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[1] KWTV's Petition sets forth numerous facts which contradict the factual findings made (implicitly) by the jury and (explicitly) by the Oklahoma Court of Civil Appeals. This Court has indicated, however, that regardless of the heightened standard of review for the question of actual malice, the jury's underlying credibility assessments and factual determinations are still subject to a clearly-erroneous standard of review. *See, infra* pp. 22-23. Petitioners have at no point alleged or demonstrated that the factual determinations of the jury or the Court of

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KWTV's first series of broadcasts regarding Mitchell concerned his treatment of a halter horse named This Lady Sings. Mitchell testified that he examined This Lady Sings at the AQHA World Championships because she was "a little tender on her right front foot" and found that she had twisted her shoe. *Mitchell v. Griffin Television, L.L.C.*, 2002 OK CIV APP 115, ¶ 9, 60 P.3d 1058.[2] Mitchell told the trainer that the horse needed a farrier. When the trainer was unable to locate a farrier that night, Mitchell testified that he gave the horse a "minute amount" of a natural blocking agent called Sarapin, which wears off in 24 to 36 hours, to relieve her discomfort. *Id.* This Lady Sings was sold after the show, and subsequently her purchasers sued the sellers in federal court, alleging that the horse was unsound at the time of sale and that her trainer had deliberately concealed the horse's lame condition. *Id.* at ¶ 10.

KWTV ran several broadcasts describing Mitchell's role in this dispute and the transcripts of these broadcasts are reproduced in the Appendix to Petitioners' brief. In the lead-in to the first story, which aired on January 26, 1998, KWTV announced that Halsne was investigating "[a]llegations of cheating and drug use at the World Quarter Horse Championships." PETITIONERS' APP. at 35a. In his report, Halsne described This Lady Sings as a

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Civil Appeals are clearly erroneous. Therefore, the appellate court's recitation of facts should govern this Court's analysis.

[2] The official opinion of the Oklahoma Court of Civil Appeals, as filed with the clerk of the Oklahoma Court of Civil Appeals and as reported on the Oklahoma Supreme Court website and in the official reporter, contains numbered paragraphs. The copy of the opinion included in Petitioners' Appendix omits the paragraph numbers. An official copy of the opinion is therefore included in Respondent's Appendix at App. 1-22.

"casualty" of the "big money" quarter horse industry. *Id.* at 36a. Halsne then stated that "[t]here is a dark secret to this horse's injury . . one the American Quarter Horse Association has under investigation. This Lady Sings was hobbling before the World Championships . . and was given a painkiller." *Id.* at 36a-37a. Halsne then stated that Mitchell "put a chemical called Sarapin in [the mare's] foot *to mask the pain*." *Id.* at 37a (emphasis added). Clearly, the suggestion was that Mitchell intended the Sarapin to conceal the horse's pain from others, not to relieve the horse's discomfort. Because Halsne tied Mitchell's administration of the pain killer to allegations of "cheating," he further sent viewers the message that Mitchell was deliberately injecting the horse with a drug, not for medical purposes, but to give it an unfair advantage in the competition.

At the close of the first broadcast, Halsne indicated that he would present a report the next night about a lawsuit relating to the horse's injury, and promised "[t]here is a lot more to this story." *Id.* at 38a. On January 27, 1998, KWTV promoted this story by stating that its investigative team was "dig[ging] deeper into allegations that a top show horse was *drugged* during the World Quarter Horse Championships." *Id.* at 39a (emphasis added). Another promotional tape featured an announcer stating, "An Oklahoma vet linked in a federal lawsuit to masking the injuries of a champion show horse." *Id.* at 40a.

During that broadcast, Halsne reported that "[t]he federal case says Mitchell knew that This Lady Sings was hobbling before the world show. Afterwards, he examined the horse for a new buyer and didn't disclose the mare's previous injury." *Id.* at 42a. KWTV then inserted a soundbite of Mitchell stating, "I don't know if I should be talking

on television about this." *Id.* at 42a. This broadcast deliberately conveyed to viewers that *Mitchell* was the alleged wrongdoer in the federal lawsuit and that he had something to hide. Any doubt that this was the message KWTV intended to convey was erased one week later when a KWTV anchor stated plainly that, "[a] federal lawsuit accuses the vet of doping up an amateur world champion quarter horse." *Id.* at 45a.

At trial, Halsne testified that he was familiar with the complaint filed in the federal lawsuit and had it in his possession prior to airing the story. *Mitchell*, 2002 OK CIV APP 115, ¶ 11. As the jury and Court of Appeals found, however, the role of Mitchell in the federal lawsuit complaint bore little resemblance to Halsne's description. The complaint did not allege that Mitchell knew the horse was hobbling before the show. *Id.* at ¶ 12. While the complaint accused the *trainer* of acting with the purpose of disguising, or masking, the horse's lame condition, it did not allege *Mitchell* acted with that purpose. *Id.* Nor did the complaint accuse Mitchell of concealing the horse's condition when he conducted the pre-purchase exam; rather it alleged the horse's condition was concealed *from* Mitchell by the silicone pads in the mare's hoof. *Id.* Halsne's statements thus did not truly and fairly report the allegations in the complaint. *Id.* at ¶ 13.

As it was running these stories, KWTV received a "tip" about Mitchell, relating to a horse named Doo Dominate and proceedings with the New Mexico State Racing Commission ("NMSRC") seven years earlier. Mitchell treated Doo Dominate prior to the 1994 All American Futurity race at Ruidoso Downs in New Mexico.[3]

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[3] Mitchell treated Doo Dominate for septic arthritis in his foreleg from August 31st to September 3rd, prior to the September 5, 1994,

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Id. at ¶ 14. During the race, the horse stumbled and broke both front legs. *Id.* Track veterinarians euthanized the horse, took blood and urine samples, and removed the front legs for necropsy. *Id.* Two other horses broke down and were euthanized that day.[4] *Id.*

Wayne Conwell, the Medication Manager for the NMSRC investigated Doo Dominate's breakdown. *Id.* at ¶ 15. Conwell sent the samples for testing and the legs for necropsy. *Id.* The necropsy of Doo Dominate revealed chronic arthritis in the front legs (which the reviewing veterinarian found serious enough to render the horse unfit for racing), as well as hairline fractures. *Id.* While the original urine sample tested positive for traces of mepivacaine, a pain-killer that was prohibited at that time,[5] a second test at an independent lab failed to confirm the presence of this drug. *Id.*

The NMSRC issued a Notice of Contemplated Commission Action against Mitchell, charging him with practicing veterinary medicine in New Mexico without a license[6] and with assisting Doo Dominate's owner and

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race. Mitchell never administered mepivacaine or any other painkiller to the horse.

[4] The attending veterinarian for Doo Dominate testified during the NMSRC investigation that there had been many complaints about holes on the race track causing horses to break down.

[5] Under a subsequent amendment to the NMSRC rules, a small amount of mepivacaine is not prohibited because it was found to have no impact on performance. *Id.* at ¶ 15 n.3.

[6] Mitchell was practicing under the supervision of a New Mexico veterinarian, which is permitted under New Mexico's general rules of veterinary practice. Mitchell was unaware, however, the general rules of veterinary practice do not apply on New Mexico racetracks, which are under the jurisdiction of the NMSRC. NMSRC rules do not permit supervised practice by out-of-state veterinarians on New Mexico racetracks.

trainer in running an unfit horse. *Id.* at ¶ 16. It did not charge Mitchell with giving the horse mepivacaine. *Id.* After a hearing, the NMSRC issued an order finding Mitchell practiced veterinary medicine without a license, and revoked his owner's license. *Id.* The NMSRC order specifically concluded the evidence was insufficient to prove Mitchell assisted the owner and trainer in running an unfit horse. *Id.* The NMSRC brought a separate action against the *owner and trainer* of Doo Dominate for the use of mepivacaine, but dismissed the charges because the results of the independent laboratory did not confirm the presence of mepivacaine in Doo Dominate's urine sample. *Id.* at ¶ 17.

Halsne obtained and was familiar with the NMSRC Notice and Final Order before airing his reports. *Id.* at ¶ 18. Nevertheless, on February 4 and 5, 1998, KWTV repeatedly aired a promotional tape promising viewers that "[y]ou'll be appalled by what racing officials say this vet has done." *Id.* at ¶ 19. In the 5:00 p.m. newscast on February 5th, a KWTV anchor promised that KWTV would show "[a] connection between the death of a high-priced race horse . . and the alleged doping of a champion quarter horse." PETITIONERS' APP. at 44a. In the 10:00 p.m. newscast, a KWTV anchor introduced Halsne's story, stating, "Not only is [Mitchell] accused in a federal lawsuit of giving a world-class quarter horse painkillers before a show here, he's also suspected of killing one of the country's top racehorses. . . . Lead investigator Chris Halsne has discovered that Dr. Mitchell has a troublesome past. . . . " *Id.* at 46a.

Halsne told viewers that the This Lady Sings incident "isn't the first time Mitchell has been in trouble for his veterinary practices." *Id.* at 46a. Halsne described Doo Dominate's breakdown and reported that the NMSRC had concluded after an "extensive investigation" that "Doo

Dominate competed doped up and with a broken knee." *Id.* at 47a. Following a sound-bite from Conwell, stating that Doo Dominate was unfit to race, Halsne reported that Mitchell "had been illegally working on the colt prior to the race." *Id.* at 47a. This broadcast sent viewers the message that the NMSRC had concluded that Mitchell was responsible for doping and killing this horse.[7] KWTV's broadcast was thus not a true and fair report of the NMSRC proceeding. *Mitchell*, 2002 OK CIV APP 115, ¶ 21.

At the close of evidence at trial, the District Court instructed the jury on the causes of action brought by Mitchell against Halsne and KWTV. In its opening instruction, the Court informed the jury that:

> Dr. Mitchell claims that the stories were false and defamatory and that the stories caused injury to himself and to his business. *He alleges that Defendants were negligent in broadcasting the stories.* Dr. Mitchell *further* alleges that the publication was a deliberate or reckless falsity.

PETITIONERS' APP. at 62a-63a (emphasis added). In its subsequent instruction on the elements of the defamation claim, the District Court instructed the jury that Mitchell was required to prove that the Defendants were negligent *or* acted in reckless disregard with respect to the truth of

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[7] Subsequent news broadcasts compounded the previous misrepresentations that Mitchell had been accused by either a federal lawsuit or the NMSRC of doping a horse. For example, a March 26, 1998, broadcast was introduced with the statement that KWTV had "showed how Mitchell was connected to the doping of a world-class racehorse and a world champion show horse." *Id.* at 50a. In a June 17, 1998, story, KWTV referred to Mitchell as "[a]n Oklahoma veterinarian, accused of doping-up some of this country's top show and race horses. . . . " *Id.* at 53a. KWTV was aware, however, neither the federal lawsuit nor the NMSRC ever accused Mitchell of "doping-up" a horse. *Mitchell*, 2002 OK CIV APP 115, ¶ 20.

the statements broadcast. RESP.'S APP. at 23-24. The jury was further instructed that if they found by clear and convincing evidence that the Defendants acted in reckless disregard with respect to the truth of the statements broadcast, then they were permitted to award Mitchell general and punitive damages. RESP.'S APP. at 24-25.

Following deliberations, the jury returned a verdict in favor of Mitchell on both the defamation and the false light claims. PETITIONERS' APP. at 31a. The jury found that the dollar amount of Mitchell's actual damages was $6,000,000. *Id.* The jury specially found that KWTV and Halsne had acted in reckless disregard of the truth of the statements published about Mitchell. *Id.* at 32a. The jury also awarded Mitchell $250,000 in punitive damages from each defendant.

On appeal, the Oklahoma Court of Civil Appeals affirmed the jury's verdict as to liability, finding the evidence sufficient to establish reckless disregard of the truth by Halsne and KWTV. *Mitchell*, 2002 OK CIV APP 115, ¶ 22. The Court further found the evidence of malice to be sufficient to justify the award of Category II punitive damages under Oklahoma law. *Id.* at ¶ 38. The Court of Appeals found, however, that the jury had erroneously been instructed that it could award presumed general damages without proof of harm because an Oklahoma statute prohibits such an award where the defamatory statements are published as part of a television broadcast. *Id.* at ¶ 28.[8] The Court of Appeals thus remanded the case

[8] Contrary to the suggestion at pages 18 and 19 of Petitioners' Brief, the Court of Appeals did *not* find that Mitchell failed to prove actual damages; the Court merely found that the jury instructions would have *permitted* an award of presumed damages and that such an award would violate state law. Mitchell in fact presented significant

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for a new trial as to the issue of compensatory damages alone. *Id.* at ¶ 41. The Court of Civil Appeals indicated that if the jury failed to award Mitchell any compensatory damages on remand, the award of punitive damages was to be vacated as a matter of state law. *Id.* at ¶ 39.

ARGUMENT AND AUTHORITIES

I. THIS COURT LACKS JURISDICTION TO REVIEW THE ORDER OF THE OKLAHOMA COURT OF CIVIL APPEALS BECAUSE IT IS NOT A "FINAL JUDGMENT" UNDER 28 U.S.C. § 1257(a).

From the earliest days of the federal judiciary, Congress has vested in the United States Supreme Court the authority to review federal-question decisions made by state courts. *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). For just as long, however, Congress has limited this Court's review of state court decisions to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had. . . ." 28 U.S.C. § 1257(a); *see also* Judiciary Act of 1789, § 25, 1 Stat. 85. This Court has thus recognized that 28 U.S.C. § 1257(a) "establishes a firm final judgment rule." *Jefferson*, 522 U.S. at 81. Under this rule, "[t]o be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *Id.* (quoting *Market Street Ry. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945)).

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evidence of actual harm, including evidence of his own emotional distress and the decline of his business.

A. The judgment of the Court of Civil Appeals is not final under § 1257 because there are further proceedings to occur at the trial court level.

This Court has repeatedly stressed that "the finality rule 'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Id.* (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945)). Therefore, before the Court will review a state court determination, it must be clear that definitive disposition has been made of all the legal and factual issues in the case. As this Court has observed, "the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up – for example, where liability has been determined and all that needs to be adjudicated is the amount of damages." *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948).

In the instant case, the order of the Oklahoma Court of Civil Appeals is not a "final judgment" within the meaning of § 1257(a) because it does not render a definitive disposition of all the legal and factual issues in this case. While the order determines the issue of liability, the Court of Appeals has remanded the case to the District Court for a new trial as to compensatory damages. Because significant further proceedings are thus contemplated in this action, the requirement of finality is not met. *Republic Natural Gas*, 334 U.S. at 68; *see also* Robert L. Stern et al., SUPREME COURT PRACTICE, § 3.7 at 150 (the fact that a case will involve further proceedings on remand "provides a strong basis for finding the state court judgment nonfinal and thus nonreviewable at this juncture").

B. This case does not fall within the fourth exception to the finality rule articulated in *Cox Broadcasting*.

Despite the lack of technical finality, Petitioners contend that this case should be *treated* as final under the fourth exception to the finality rule outlined in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-483 (1975). This exception recognizes finality within the meaning of § 1257(a) where three distinct conditions are present: (1) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court"; *and* (2) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action"; *and* (3) "a refusal immediately to review the state court decision might seriously erode federal policy." *Id.* at 482-83. Because, as shown below, this case does not satisfy the second and third conditions set forth above, this Court lacks jurisdiction to hear Petitioners' claims. Moreover, because the proceedings remaining on remand are likely to raise additional federal questions, *Cox Broadcasting* suggests that review of any properly presented federal questions should await the conclusion of the proceedings on remand. *Id.* at 477.

1. A reversal of the Court of Civil Appeals on the existence of actual malice would not preclude the further proceedings contemplated below.

To fall within the fourth exception to the finality rule articulated by this Court in *Cox Broadcasting*, the Court must satisfy itself that "reversal of the state court on the federal issue would be preclusive of any further litigation

on the relevant cause of action. . . ." *Id.* at 482-83. Petitioners thus argue that "were this Court to conclude that, under the appropriate standard of independent review, the evidence presented at trial did not clearly and convincingly demonstrate actual malice, the reversal of the decision of the Court of Civil Appeals would preclude further litigation." PETITIONERS' BR. at 19. This contention is simply not true. To the contrary, no determination by this Court of the questions presented would prevent the Court of Civil Appeals from remanding this case for a new trial as to compensatory damages on both the defamation and false light claims.

First, it is conceded by Petitioners that Mitchell is a private figure. Therefore, while Mitchell's claim for false light invasion of privacy requires a showing of reckless disregard as a matter of state law, this standard is not mandated by the federal constitution. *Colbert v. World Pub'g Co.*, 1987 OK 116, 747 P.2d 286, 291-92.[9] The Oklahoma Court of Civil Appeals has determined that the evidence was sufficient to establish reckless disregard as a matter of Oklahoma law, *Mitchell*, 2002 OK CIV APP 115, ¶¶ 13 & 22, and the Oklahoma Supreme Court declined

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[9] In *Zeran v. Diamond Broadcasting, Inc.*, 203 F.3d 714 (10th Cir. 2000), a case involving a false light claim brought by a private figure plaintiff against a media defendant, the Tenth Circuit rejected the plaintiff's argument that the Oklahoma Supreme Court would no longer apply the *Colbert* recklessness standard and would instead follow other states that have permitted recovery under a negligence theory in false light media cases involving private individuals. The Court found that the plaintiff "has cited no authority subsequent to *Colbert* that justifies [his] prediction that the Oklahoma Supreme Court would retreat from the *Colbert* requirements." *Id.* at 720. This language clearly indicates that the recklessness standard is a matter of Oklahoma state law and is not *constitutionally* mandated in false light media cases involving private plaintiffs, such as the instant case.

to review this determination. Because this is purely a question of state law, this Court does not have jurisdiction to review the Oklahoma courts' actions. Accordingly, even if this Court were to find the evidence presented insufficient to establish actual malice as a matter of federal constitutional law, this would not preclude further proceedings on Mitchell's false light claim.

Second, the District Court properly instructed the jury that, for Mitchell to recover on his defamation claim, he was required to prove that the Defendants *either* were negligent *or* acted in reckless disregard with respect to the truth of the statements broadcast. RESP.'S APP. at 23-24. While Mitchell could expand the *relief* available by showing the greater culpability, such a showing was not necessary to sustain *liability*. *Mitchell*, 2002 OK CIV APP 115, ¶ 6; *Martin v. Griffin Television, Inc.*, 1976 OK 13, 549 P.2d 85.

The jury in this case made a special finding that there was clear and convincing evidence Petitioners acted in reckless disregard of the truth of the statements published. PETITIONERS' APP. at 32a. The Court of Appeals affirmed, finding "clear and convincing evidence from which the jury could find he made the statements with reckless disregard as to their falsity." *Mitchell*, 2002 OK CIV APP 115, ¶ 13. The Court of Appeals also found that because Mitchell proved malice, he did not need to prove negligence. *Id.* This is, of course, because the lesser degree of culpability is subsumed within the greater degree of culpability – every time a reporter publishes a story "with knowledge that it was false or with reckless disregard of whether it was false or not," *New York Times v. Sullivan*, 376 U.S. 254 (1964), that reporter has failed to exercise ordinary care.

Because the determination by the jury and Court of Appeals that there was clear and convincing evidence of reckless disregard would necessarily encompass a finding of negligence (a lesser standard of culpability with a lesser standard of proof), whatever ruling this Court might make on the question of actual malice would not affect Petitioners' *liability* on the defamation claim.[10] It would only affect the availability of presumed damages. However, in this case, the Oklahoma Court of Civil Appeals has already held that presumed damages are not permitted on state law grounds. Therefore, a reversal of the Court of Appeals on the question of actual malice will not affect the question of liability or the availability of presumed damages. Whatever this Court's holding, this case will return to the District Court for a new trial on the issue of compensatory damages, with presumed damages not permitted.

The only issue as to which the existence of actual malice could have any relevance whatsoever is Mitchell's request for punitive damages. This Court has held that States may not permit recovery of punitive damages in defamation actions in the absence of actual malice, at least in actions involving matters of public concern. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); *Dun &*

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[10] While the question of the existence of negligence is apparently also subject to heightened review on appeal, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20-21 (1990), for the reasons discussed in Sections III and IV, *ante*, the Oklahoma Court of Civil Appeals conducted a constitutionally-adequate review of the record and found evidence sufficient to establish a level of culpability beyond (and subsuming) negligence. The existence or non-existence of expert testimony as to Petitioners' negligence is irrelevant. Contrary to Petitioners' suggestion, under Oklahoma law, there is no requirement that expert testimony be offered to establish negligence, although this will normally be the case. *Malson v. Palmer Broadcasting Group*, 1997 OK 42, 936 P.2d 940, 941.

Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985). As the Court of Appeals indicated, however, its affirmance of the award of punitive damages in this case was conditioned upon the jury awarding Mitchell actual damages on retrial. Therefore, at this point, there is no way to know whether an award of punitive damages will be made in this case. Given this uncertainty – and given the fact that the award or non-award of punitive damages will be purely ministerial and will not involve the expenditure of any time, effort or money on behalf of the parties – it would appear more advisable to await an actual award of punitive damages before deciding this question.

2. A refusal immediately to review the Court of Civil Appeals' decision will not seriously erode federal policy.

For a case to fall within the fourth *Cox Broadcasting* exception, it must also be established that "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox Broadcasting*, 420 U.S. at 483.[11] In the instant case, no federal policy is in danger of erosion if KWTV is forced to retry damages and then appeal all resulting federal issues at that time. This Court's orders do not leave in place any statute or injunction which is operating as a prior restraint on the press

[11] While this element is virtually unaddressed by Petitioners, cases from this Court establish that it is an essential condition. Thus, where this Court has found that delaying review until after trial would be intolerable, this Court has treated the State court decision as final. *See, e.g., Cox Broadcasting*, 420 U.S. at 485-86; *Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974). Where this Court has found no federal policy at risk of erosion, however, this Court has declined to consider the state court decision "final." *See, e.g., Florida v. Thomas*, 532 U.S. 774, 780 (2001); *Flynt v. Ohio*, 451 U.S. 619, 621 (1981).

during the pendency of the lower court proceedings as appears to be the case in virtually every First Amendment action reviewed by the Supreme Court under an exception to the finality rule. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (injunction prohibited enforcement of boycott of white-owned businesses); *Cox Broadcasting*, 420 U.S. at 485-86 (statute prohibited media from publishing name of rape victim); *National Socialist Party v. Skokie*, 432 U.S. 43 (1977) (injunction prohibited petitioners from marching or parading); *Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241 (1974) (statute required newspaper to carry candidate's reply to editorial).

3. The retrial on the issue of damages is likely to raise additional federal issues.

This Court has further observed that in "most, if not all, of the cases in [the four *Cox Broadcasting*] categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date. . . ." *Cox Broadcasting*, 420 U.S. at 477. Thus consideration of the federal questions raised in such cases prior to their conclusion would run no risk of subjecting the courts or the parties to " 'the inconvenience and costs of piecemeal review.' " *Id.* at 478 n.7 (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)).

In this case, however, there is a strong probability that additional federal questions will be raised by the jury's award of compensatory damages on remand. For example, in their brief before the Oklahoma Court of Civil Appeals, Halsne and KWTV argued that the award of compensatory damages by the jury in this case was "grossly excessive" and thus violated the First and Fourteenth Amendments to the U.S. Constitution. If a second

jury were to award a similar or larger sum to Mitchell, Halsne and KWTV would likely reiterate their federal constitutional challenge to that award. Additionally, the Court of Civil Appeals has held that, if the jury awards *any* compensatory damages to Mitchell, the full award of punitive damages will stand. *Mitchell*, 2002 OK CIV APP 115, ¶ 39. In the unlikely event that the jury on retrial were to award only *nominal* damages to Mitchell, one could anticipate that Petitioners might challenge the award of $500,000 in punitive damages under the Fourteenth Amendment and *BMW of North America v. Gore*, 517 U.S. 559 (1996).

4. Conclusion.

As the foregoing demonstrates, this case does not fall under the fourth exception to the finality rule articulated by this Court in *Cox Broadcasting*. The Oklahoma Court of Civil Appeals' decision did not terminate the instant litigation. Nor would a reversal by this Court on the federal question terminate the instant litigation. Rather, regardless of how this Court might determine any of the properly-presented federal issues, this case will return to the District Court for a new trial as to compensatory damages on both the defamation and false light claims, with presumed damages not permitted.

II. REVIEW OF THE PRIMARY QUESTION PRESENTED IS UNNECESSARY BECAUSE THE RECORD DEMONSTRATES THAT THE OKLAHOMA COURT OF CIVIL APPEALS APPLIED THE PROPER STANDARD OF REVIEW TO THE QUESTION OF ACTUAL MALICE.

The Supreme Court has instructed that "[j]udges, as expositors of the Constitution, must independently decide

whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 511 (1984). In conducting this independent review "it is not actually necessary to review the 'entire' record to fulfill the function of independent appellate review on the actual-malice question; rather, only those portions of the record which relate to the actual-malice determination must be independently assessed." *Id.* at 514 n.31. It must be apparent that the reviewing court has "examine[d] for [itself] the statements in issue and the circumstances under which they were made" to see whether they are "of a character which the principles of the First Amendment . . . protect." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)).

Here, the Court of Civil Appeals acted precisely as directed by this Court. First, the Court of Civil Appeals noted that the element of actual malice is subject to a heightened clear-and-convincing standard of proof, and that this is the only element subject to this standard. *Mitchell*, 2002 OK CIV APP 115, ¶ 8. As shown below, the Court of Civil Appeals then conducted a thorough, independent review of the portions of the record that relate to the actual-malice question and concluded that there *was* clear and convincing evidence that KWTV broadcast defamatory statements about Mitchell with reckless disregard for their truth or falsity.[12] There is thus

[12] Even if the Court of Appeals' correct *general* statement that a jury verdict must be affirmed if there is "any competent evidence reasonably tending to support it," could – taken in isolation – suggest that an insufficient standard of review was applied to the question of

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no manner in which the Court of Appeals' opinion failed to comport with the standard of review articulated by the Supreme Court in *Bose* and *Harte-Hanks*.

In this case, the portions of the record that relate to the actual-malice determination consist of the KWTV broadcasts, Halsne's testimony, Mitchell's testimony, the federal complaint, and the NMSRC file. That the Court of Appeals independently reviewed the defamatory broadcasts in their entirety is evident from the fact that the Court of Appeals quotes various statements made in the broadcasts which were not quoted by either party in the appellate briefing. *See Mitchell*, 2002 OK CIV APP 115, ¶¶ 11 (first quoted passage), 19 (first sentence), & 20 (first quoted sentence). That the Court of Appeals independently reviewed Halsne's testimony in its entirety is evident from the fact that the Court of Appeals quotes statements by Halsne describing his review of the NMSRC file which were not quoted by either party in the appellate briefing. *See id.* at ¶ 18 (second indented passage). That the Court of Appeals independently reviewed Mitchell's testimony in its entirety is evident from the fact that the Court of

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actual malice, where an appellate court's opinion as a whole demonstrates that the proper analysis was conducted, it matters not that statements read in isolation might suggest an improper standard. *Harte-Hanks*, 491 U.S. at 667-68; *see also Powell v. State*, 1995 OK CR 37, ¶ 3, 906 P.2d 765, 784 (Order Granting Rehearing) (upholding sentence despite fact that Court's original opinion articulated an improper standard of review, stating "[w]e have reviewed the opinion and find that [the correct] standard was *employed* by this Court") (emphasis added); *Moorhead v. First Piedmont Bank & Trust Co.*, 256 S.E.2d 414, 416 (S.C. 1979) (affirming trial court decision where, through apparent inadvertence, the trial court recited the incorrect standard of review); *Bill Parker & Assocs. v. Rahr*, 456 S.E.2d 221, 223 (Ga. App. 1995) (affirming trial court decision where trial court apparently misstated relevant burden of proof).

Appeals quotes testimony from Mitchell which was not quoted by the parties in the appellate briefing. *See id.* at ¶ 9 (fifth sentence). That the Court of Appeals independently reviewed the complaint in the federal lawsuit is evident from the fact that the Court of Appeals sets forth the allegations of the complaint in far greater length than did either party in the appellate briefing. *See id.* at ¶ 10 (indented passages). Indeed, the Court of Appeals reviewed the complaint so closely that it even found a discrepancy between the allegations in the complaint and the KWTV broadcasts that was not raised by Mitchell. *See id.* at ¶ 12 (noting that complaint alleged the horse's condition was concealed from Mitchell by silicone pads on the horse's hoof). Finally, that the Court of Appeals conducted an independent review of the NMSRC file is evident from the fact that the Court of Appeals refers to details of an NMSRC rule that were not cited by either party in the appellate briefing. *See id.* at ¶ 15 n.3 (noting that mepivacaine was prohibited within 72 hours of race).

After conducting its thorough review of the record, the Court of Appeals held that there *was* clear and convincing evidence of actual malice in this case. As to the stories about This Lady Sings, the Court of Appeals recited the various discrepancies between the allegations described by Halsne in his broadcasts and the allegations actually contained in the federal lawsuit. As the Court of Appeals stated, "Halsne's own admission he was familiar with the complaint is clear and convincing evidence from which the jury could find he made the statements with reckless disregard as to their falsity." *Id.* at ¶ 13.[13]

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[13] In *Curtis Pub'g Co. v. Butts*, 388 U.S. 130, 139 (1967), the Supreme Court affirmed the jury verdict for the plaintiff where the trial judge had similarly described his review of the jury verdict as follows:

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The Court of Appeals also found the jury's verdict to be supported by the evidence relating to the news stories about Doo Dominate. *Id.* at ¶ 14. Based on the unambiguous public documents of the NMSRC, the Court of Appeals found that independent laboratory testing had failed to confirm the presence of the mepivacaine in Doo Dominate. *Id.* at ¶ 15. The NMSRC Notice of Contemplated Action did not charge Mitchell with giving Doo Dominate mepivacaine. *Id.* at ¶ 16. The NMSRC brought a separate action against the owner and trainer of Doo Dominate for the use of mepivacaine, but this action was dismissed because, under NMSRC rules, there was no positive drug test. *Id.* at ¶ 17. These documents all indicated that the NMSRC had concluded that Doo Dominate was not "doped" prior to the All American Futurity and that the NMSRC had never accused Mitchell of doping the horse. Halsne admitted to reviewing these documents before airing his reports.[14] *Id.* at ¶ 18.

After reviewing the various KWTV broadcasts, the Court of Appeals found, "[t]his record presents sufficient evidence from which the jury could find Halsne falsely reported the NMSRC found Doo Dominate raced doped-up and Mitchell was linked to the doping. *There is evidence that Halsne knew the statement was false or acted with reckless disregard of whether it was false or not.*" *Id.* at ¶ 21 (emphasis added). This statement, coupled with its

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"there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not."

[14] Petitioners' arguments that they should not be forced to investigate the truth of the broadcasts are undermined by the fact that Halsne *already* possessed and was familiar with the unambiguous public documents establishing the falsity of his broadcasts. There was thus no need to investigate.

earlier recognition that such evidence was reviewed to satisfy a clear and convincing standard, clearly represents the Court of Appeals' independent conclusion that the record in this case contained clear and convincing evidence of actual malice. The review conducted by the Court of Appeals thus comports with the standards enunciated by this Court in *Bose* and *Harte-Hanks*, and review of this case is not necessary.

III. REVIEW IS UNNECESSARY BECAUSE THE COURT OF CIVIL APPEALS PROPERLY CONCLUDED THAT THE RECORD CONTAINS CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE.

Petitioners' primary claim regarding the sufficiency of the evidence is that the appellate court reviewed the entire record only to determine whether there was evidence which supported the jury's verdict, rather than weighing all the evidence to determine whether, on balance, it supported the Defendants' case. Even if this were true, decisions from this Court and others indicate that review of the record in a light favorable to the party who prevailed before the jury does not fail to satisfy the constitutionally-mandated independent review.

This Court has indicated that in conducting the constitutionally-required independent review, a reviewing court must still accept the jury's underlying credibility assessments and factual determinations unless they are clearly erroneous. *Harte-Hanks Communications*, 491 U.S. at 688. Further, this Court has maintained that the requirement of independent review preserves the "due regard" that is ordinarily given to the trial judge's opportunity to observe the demeanor of witnesses. *Bose*, 466 U.S. at 499-500. This Court also noted that "[t]he independent review function is not equivalent to a 'de novo'

review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff." *Id.* at 514 n.31.

Apart from the finding of actual malice, to which the rule of independent review applies, therefore, the other findings of fact in a defamation case are properly tested under the clearly erroneous standard of review. *Id.*; *see also Brown v. Petrolite Corp.*, 965 F.2d 38, 46 (5th Cir. 1992). Thus state courts have concluded that their task is to "determine what evidence the jury reasonably accepted as credible, and whether this evidence clearly and convincingly establishes actual malice." *Beal v. Bangor Pub'g Co.*, 714 A.2d 805, 808 (Me. 1998); *see also WJLA-TV v. Levin*, 564 S.E.2d 383, 392 (Va. 2002) (where jury has found by clear and convincing evidence that defendant published statements with actual malice, reviewing court in conducting its independent review of the record "must view that record in a light favorable to the plaintiff").

In this case, the record contains an abundance of objective evidence supporting the jury's conclusion that, despite his claims to the contrary, Halsne entertained serious doubts as to the truth of his stories about Mitchell, and that his failure to investigate was a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Conwell's story.[15] While it is

[15] While the standard of actual malice is a subjective one, this does not mean that the trier of fact is limited to the defendant's own version of what was in his mind at the time of publication. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) ("[p]rofessions of good faith" do not insulate a defendant from liability). Rather, "[t]he subjective determination of whether [a defendant] in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be

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unnecessary to detail all such evidence, the jury could have based its finding of actual malice, for example, on the following.

Halsne's reports regarding This Lady Sings purport to describe the allegations made in a federal lawsuit. Halsne had a copy of this lawsuit and was familiar with it. Halsne and KWTV repeatedly reported that Mitchell had been "accused" in the lawsuit of "doping" or "drugging" This Lady Sings in order to mask her injuries and fraudulently induce a third party to purchase the injured horse. The lawsuit, however, on its face contained no such allegations.

Additionally, prior to airing any reports regarding Doo Dominate, Halsne obtained a copy of the NMSRC's final order in the Mitchell matter. This order indicated that Mitchell had been disciplined for practicing veterinary medicine on the grounds of a New Mexico racetrack without the appropriate license. It also demonstrated on its face that Mitchell had been cleared of charges that he had assisted the owner and trainer of Doo Dominate in running an unsound horse.

After familiarizing himself with this report, Halsne traveled to New Mexico to meet with Conwell. His sole meeting with Conwell consisted of a 12 or 13 minute interview, during which Conwell allegedly told him that

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rare for a defendant to admit such doubts. . . . " *Bose Corp. v. Consumers Union of United States*, 692 F.2d 189, 196 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984); *see also Beal v. Bangor Pub'g Co.*, 714 A.2d 805, 807 (Me. 1998) ("Rare is the instance in which a defendant journalist admits to publishing a defamatory article with either knowledge of, or reckless disregard to, the statement's falsity. . . . "). A failure to investigate may provide circumstantial evidence from which one may infer that the defendant entertained doubts as to the truth of the statements published. *See, e.g., Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

Mitchell "doped" and "helped to kill" Doo Dominate. Immediately after this interview, the NMSRC made the entire investigative file regarding Doo Dominate available to Halsne and his camera man. Despite his awareness that the NMSRC notice of proposed action and final order both contradicted Conwell's story, Halsne decided not to take advantage of this opportunity to review the investigative file to evaluate the truth of Conwell's statements. Instead, Halsne just picked out a few documents which supported Conwell's story, virtually all of which were authored by Conwell himself. Halsne deliberately ignored documents that would have cast doubt on Conwell's story. Thus, when asked whether he was aware that there was a negative drug test on Doo Dominate after the original positive, Halsne responded that "our interest was the positive drug test. . . ." Halsne also testified that he was not interested in knowing the outcome of the drugging charges against the owner and trainer of Doo Dominate because he "was more interested in Dr. Mitchell's connection" to the horse.

Halsne's only attempt at justifying his disregard of the file unraveled spectacularly before the jury when he was caught in a flagrant falsehood, and his elaborate explanation was exposed as pure invention. Halsne repeatedly told the jury that a full review of the file was unnecessary because Conwell had walked him through the documents, and that this guidance had ensured that he reviewed and understood the crucial documents. Both Defendants' expert witness *and* the owner of KWTV told the jury that such guidance would be *absolutely necessary*, given the technical nature of the documents. Halsne even told the jury that it was Conwell's ability to point out crucial documents that confirmed his credibility, stating, "I think we trusted his judgment, especially when he backed it up with documents. . . ." Conwell, however, flatly denied that he had shown Halsne *any* documents or that he had even been in the building when Halsne was reviewing them.

When told that Halsne had so testified, Conwell reiterated "I did not go through the documents with Mr. Halsne."

Where the jury heard Halsne, his expert, and his employer emphasize that Conwell's assistance was crucial to understanding the investigative file; and where the jury heard Halsne testify repeatedly that he received such assistance; and where Conwell unequivocally denied that he provided such assistance; the jury was entitled – if not compelled – to conclude that Halsne wholly fabricated the investigation he had testified was essential.[16]

IV. PETITIONERS HAVE NOT PRESERVED THE QUESTION OF WHETHER ACTUAL MALICE MAY BE PREMISED ON A DEFENDANT'S RATIONAL INTERPRETATION OF AN AMBIGUOUS PUBLIC DOCUMENT.

Petitioners have asked this Court to consider the question "[w]hether, in a defamation and false light invasion of privacy case, the First and Fourteenth Amendments, as interpreted by *Time, Inc. v. Pape*, 401 U.S. 279 (1971), permit a finding of actual malice solely on the basis that the appellate court's interpretation of an ambiguous public document differs from the rational

[16] Not only did Halsne invent a controversy, he also ignored clear warnings of the essential dishonesty of his crusade, another classic indicium of malice. KWTV and Halsne received two letters from an attorney for Mitchell warning them that the Doo Dominate story was false. Halsne took no additional action to verify the story after receiving these warnings, other than to obtain a copy of the full investigative file, which sat unread on his desk. Nevertheless, after receiving the attorney's initial letter, KWTV broadcast five more stories about Mitchell based solely on Conwell's allegations. Under such circumstances, the jury was entitled to find that Halsne's bare assertion of a lack of malice was unpersuasive and grossly outweighed by other, more objective evidence.

interpretation given the document by the broadcaster. . . ." PETITIONERS' BR. at i. As required by Supreme Court Rule 14(1)(g)(i), Petitioners represent that they raised this issue before the Court of Civil Appeals, and refer this Court to the relevant portion of their reply brief submitted to the appellate court.[17] Petitioners then state, without further explanation, that "[t]he Court of Civil Appeals did not discuss the issue in its opinion." PETITIONERS' BR. at 29 n.24.

It would appear, however, that the reason the Court of Civil Appeals did not discuss this issue is that Petitioners had not preserved it for appellate review. It is axiomatic that, as a matter of Oklahoma law, "a party will not be permitted to raise issues on appeal which were not raised in the trial court." *Continental Nat. Gas, Inc. v. Midcoast Nat. Gas, Inc.*, 1996 OK CIV APP 157, 935 P.2d 1185, 1189. It appears that Petitioners never raised the "rational interpretation of an ambiguous public document" issue before the District Court in this matter. Indeed, while Supreme Court Rule 14 requires that Petitioners specify "the stage in the proceedings, both *in the court of first instance* and in the appellate courts, when the federal questions sought to be reviewed were raised," U.S. Sup. Ct. Rule 14(1)(g)(i) (emphasis added), Petitioners make no claim that this issue was raised before the District Court. Because this issue was thus not preserved for appellate review, and the Court of Civil Appeals accordingly

[17] Petitioners' reference to this brief fails to satisfy Rule 14, however, because the brief was stricken from the record by the Oklahoma Supreme Court for violating that court's length requirements. RESP.'S APP. at 26. Petitioners subsequently filed a *corrected* reply brief on June 20, 2002, which was accepted by the Court. *Id.* The corrected reply brief omits some of the text appearing in Petitioners' Appendix. RESP.'S APP. at 27-29.

refrained from addressing it, Petitioners may not now raise the issue in this Court.

Even if this Court were to address the impact of *Time, Inc. v. Pape*, 401 U.S. 279 (1971), on this litigation, however, such consideration would not aid Petitioners' case. In *Time*, a libel action was brought by a police officer against a magazine based on an article which described a report issued by the United States Commission on Civil Rights. The magazine reported as a charge by the Commission what was really a description by the Commission of the allegations in a complaint filed in a civil rights action. *Id.* at 284-85. The sole issue on appeal was whether the omission of the word "alleged" in reference to Commission's description of the complaint showed actual malice. *Id.* at 283. This Court ultimately found that, when the magazine failed to state that the Commission in reporting the incident had confined itself to the allegations of a complaint, its conduct was insufficient to sustain a jury finding of actual malice.

In reaching this conclusion, however, the Court noted that:

> A press report of what someone has said about an underlying event of news value can contain an almost infinite variety of shadings. Where the source of the news makes bald assertions of fact – such as that a policeman has arrested a certain man on a criminal charge – there may be no difficulty. But where the source itself has engaged in qualifying the information released, complexities ramify.

Id. at 286. What makes *Time* inapplicable to the instant case is that the reporter in *Time* was in the latter situation; reporting on an ambiguous secondary source's description of an incident. Halsne, however, was in a situation much more akin to the former described above;

that is, he was reporting on an incident based on unambiguous *primary* sources (*i.e.,* the federal court complaint and the NMSRC notice of proposed action and final order). Halsne tries to put himself into the latter category by claiming that his interview with Conwell added ambiguity to his understanding of the events in New Mexico. However, where Halsne was in possession of and familiar with an unambiguous primary source, *Time* does not stand for the proposition that he can use a secondary source like Conwell to create an illusion of ambiguity where none exists.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CLYDE A. MUCHMORE
Counsel of Record
MARY H. TOLBERT
CROWE & DUNLEVY
20 North Broadway, Suite 1800
Oklahoma City, Oklahoma
73102-8273
(405) 235-7734

and

DOUGLAS E. STALL
LATHAM, STALL, WAGNER,
STEELE & LEHMAN
Boulder Towers
1437 South Boulder, Suite 820
Tulsa, Oklahoma 74119
(918) 382-7523

Counsel for Respondent

APPENDIX A

THIS OPINION HAS BEEN RELEASED FOR PUBLICATION BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS
OF THE STATE OF OKLAHOMA

DIVISION III

H.L. MITCHELL, Plaintiff/Appellee, vs. GRIFFIN TELEVISION, L.L.C., an Oklahoma corporation, and CHRIS HALSNE, an individual, Defendants/Appellants.	)	Case No. 96,640

APPEAL FROM THE DISTRICT COURT OF
CREEK COUNTY, OKLAHOMA

HONORABLE JOE SAM VASSAR, TRIAL JUDGE

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

(Filed Sep. 6, 2002)

Douglas E. Stall,
David Von Hartitzsch,
LATHAM, STALL, WAGNER,
STEELE, & LEHMAN,
Tulsa, Oklahoma,

Clyde A. Muchmore,
Mary Hirth Tolbert,
CROWE & DUNLEVY,
Oklahoma City, Oklahoma, For Plaintiff/Appellee,

Robert D. Nelon,
Jon Epstein,
Susanna G. Voegeli,
HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON,
Oklahoma City, Oklahoma, For Defendants/Appellants.

OPINION BY CAROL M. HANSEN, Presiding Judge:

¶1 Defendant/Appellants, Griffin Television, L.L.C. (Griffin) and Chris Halsne (collectively KWTV), seek review of the trial court's judgment based on a jury verdict in favor of Plaintiff/Appellee, H.L. Mitchell. We affirm as to the finding of liability and award of punitive damages, reverse as to compensatory damages, and remand for new trial as to compensatory damages.

¶2 Mitchell is a veterinarian in Bristow, Oklahoma. Between January 27, 1998, and September 13, 1998, KWTV broadcast seven stories dealing with Mitchell's treatment of a halter horse named This Lady Sings at the 1997 World Quarter Horse Championships in Oklahoma City and the death of a quarter horse named Doo Dominate at the All American Futurity in New Mexico on September 5, 1994. Mitchell sued KWTV for defamation and false light invasion of privacy arising from the stories.

¶3 A jury trial took place in June 2001. At the close of evidence, KWTV moved for a directed verdict. The trial court denied the motion and submitted the case to the jury. The jury specially found Griffin and Halsne acted in reckless disregard of the truth of the statements published and intentionally and with malice concerning Mitchell. It awarded $6,000,000.00 in actual damages against Griffin and Halsne, $250,000.00 in punitive damages against Griffin, and $250,000.00 in punitive damages against

Halsne. The trial court granted judgment for the verdict amount, as well as $1,323,950.00 in prejudgment interest and $5,010.02 in costs, for a total judgment amount of $7,828,960.02. KWTV appeals from that judgment.

I

¶4 One group of KWTV's contentions raises the issue of whether there was sufficient evidence for the jury to hold KWTV liable to Mitchell. KWTV argues the trial court should have directed a verdict in its favor because Mitchell (1) failed to present evidence from which a jury could reasonably conclude any of the statements about which he complained is substantially false, (2) presented no evidence of special damages to support a defamation *per quod* claim, (3) failed to submit expert testimony that KWTV departed from the standard of care to which reasonable journalists ordinarily adhere under similar circumstances, (4) failed to present clear and convincing evidence of actual malice, and (5) put on no evidence any harm to his reputation was caused by false statements rather than true ones. Because the last contention relates to damages, we will address it in Part II below.

¶5 In order to recover for defamation, a private figure must prove (1) a false and defamatory statement, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher; and (4) either the actionability of the statement irrespective of special damage, or the existence of special damage caused by the publication. *Sturgeon v. Retherford Publications, Inc.*, 1999 OK CIV APP 78, 987 P.2d 1218, 1223. If the publication is a fair and true report of a proceeding authorized by law or anything said in the proceeding, it is

privileged. 12 O.S.1991 §1443.1(A). Negligence is the failure to exercise ordinary care, which is "that degree of care which ordinarily prudent persons engaged in the same kind of business usually exercise under similar circumstances." *Martin v. Griffin Television, Inc.,* 1976 OK 13, 549 P.2d 85, 92. Slander is actionable *per se,* without a showing of actual damage, if it falls within the first four sections of 12 O.S.1991 § 1442.[1] *Standifer v. Val Gene Management Services, Inc.,* 1974 OK CIV APP 41, 527 P.2d 28, 31.

¶6 While negligence is the minimum level of fault necessary for a private figure to recover for slander, the plaintiff may expand the relief available by showing greater culpability on the defendant's part. Upon a showing of actual malice, the plaintiff may recover punitive damages, and, where otherwise allowed, presumed damages.[2] *Martin v.*

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[1] 12 O.S.1991 § 1442 provides,

Slander is a false and unprivileged publication, other than libel, which:

1. Charges any person with crime, or with having been indicted, convicted or punished for crime.

2. Imputes in him the present existence of an infectious, contagious or loathsome disease.

3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit.

4. Imputes to him impotence or want of chastity; or,

5. Which, by natural consequences, causes actual damage.

[2] See Part II below for a discussion of presumed damages.

Griffin Television, Inc., 1976 OK 13, 549 P.2d 85, 93. "Actual malice" means "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). Proof of malice obviates the need to prove negligence.

¶7 In order to recover for false light invasion of privacy, the plaintiff must show (1) the defendant gave publicity to a matter concerning the plaintiff that placed the plaintiff before the public in a false light, (2) the false light in which the plaintiff was placed would be highly offensive to a reasonable person, and (3) the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. *McCormack v. Oklahoma Pub. Co.,* 1980 OK 98, 613 P.2d 737, 740.

¶8 In reviewing a judgment based on a jury verdict, we may not disturb the jury's verdict where there is any competent evidence reasonably tending to support it. The jury is the exclusive arbiter of the credibility of the witnesses, and its verdict is conclusive as to all disputed facts and all conflicting statements. We must determine the sufficiency of the evidence to sustain a judgment in light of the evidence tending to support it, together with every reasonable inference deducible therefrom, rejecting all evidence adduced by the adverse party which conflicts with it. *Florafax Intern., Inc. v. GTE Market Resources, Inc.,* 1997 OK 7, 933 P.2d 282, 287. As to the element of malice, the evidence must be sufficient for a trier of fact to find or infer its existence subject to a clear and convincing standard of proof. *Herbert v. Oklahoma Christian Coalition,* 1999 OK 90, 992 P.2d 322, 328. This standard applies to both public officials and private figures. *Gaylord*

Entertainment Co. v. Thompson, 1998 OK 30, 958 P.2d 128, 141 n. 46. However, it does not apply to any element other than malice.

¶9 The news stories of which Mitchell complains began with reports relating to This Lady Sings. Mitchell testified he examined the horse soon after she was unloaded at the fairgrounds before the horse show. He said she was "a little tender on her right front foot" and had twisted her shoe. He testified he told the trainer the horse needed a farrier. Mitchell said the trainer was unable to find a farrier that evening and was worried the horse would "fret all night and gan up and lose weight and quit drinking." Mitchell said he wrapped her foot, but could see she was not very comfortable on it, so he "did a Sarapin posterior digital heel block on her" with "three-quarters of a cc" of Sarapin, which was "a minute amount." He said Sarapin is called a natural block in holistic circles and wears off in 24 to 36 hours. Mitchell testified This Lady Sings was not hobbling when he saw her.

¶10 This Lady Sings was sold after the show. On January 21, 1998, her purchaser sued the sellers and trainer in federal district court for rescission of the contract and damages for breach of warranty and fraud in the inducement of the contract. The complaint alleged as follows:

> 12. That on November 15, 1997, Skoda [the purchaser] had the mare inspected by Dr. Mitchell, a veterinarian on the grounds of the show, who conducted a prepurchase exam of the horse and represented to Skoda, and his insurer, that the horse was sound.
>
> . . .

16. That the mare was then presented to the previous examining veterinarian, which [sic] found some bruising on the hoof wall, apparently related to improper shoeing and that silicone had been placed under the pad of the mare's left hoof; the silicone pads prevented a clear view of the sole at the time of the original purchase examination.

. . .

19. That Skoda conducted a further investigation into the unsoundness of the mare and later on November 22, 1997, learned from Dr. Mitchell that prior to the Amateur Division Showing, he had "blocked" one of Casper's adult horses scheduled to appear in the Amateur Division showing; said block being a veterinary technique to numb pain, so that the horse will not present outward manifestation of pain, or unsound gate.

20. That Casper had only one adult horse to be presented and [sic] the said showing, to wit; "This Lady Sings".

21. That Casper knew that the mare was unsound at the time of the negotiations with Skoda and had undertaken specific overt acts to disguise the lame condition.

¶11 In the January 26, 1998 10:00 p.m. news broadcast, Halsne reported,

> This Lady Sings was named best-amateur-in-the-world just three months ago. Now, her new trainer . . . says lameness in her front feet have [sic] ended the horse's career. . . .
>
> There is a dark secret to this horse's injury. . One the American Quarter Horse Association has

> under investigation. This Lady Sings was hobbling before the World Championships. . and was given a painkiller. . . .
>
> What [Mitchell] did was put a chemical called Sarapin in her foot to mask the pain.

Prior to the next evening's broadcast, KWTV ran a promotional tape in which the announcer stated, "An Oklahoma vet linked in a federal lawsuit to masking the injuries of a champion show horse." In the 10:00 p.m. broadcast, Halsne reported,

> The federal case says Mitchell knew that This Lady Sings was hobbling before the world show. Afterwards, he examined the horse for a new buyer and didn't disclose the mare's previous injury. . . .
>
> Dr. Mitchell claims the horse was badly shod when it came to the world championships, and he simply treated a bruise. The new buyer says the horse's health condition is chronic.

At trial, Halsne testified he was familiar with the complaint and had it in his possession prior to airing the story.

¶12 The complaint in the federal suit did not say Mitchell knew the horse was hobbling before the horse show. While it did accuse the trainer of acting with the purpose of disguising, or masking, the horse's lame condition, it did not allege Mitchell acted with that purpose. It alleged Mitchell told the buyer he blocked the horse. It alleged the block is a veterinary technique to numb pain, so that the horse will not appear unsound, but it did not allege Mitchell intended it for the purpose of masking the horse's unsoundness. The complaint did not accuse Mitchell of concealing the horse's condition when he did

the prepurchase exam; rather it alleged the horse's condition was concealed from Mitchell by the silicone pad on the mare's left hoof.

¶13 Halsne's statements do not truly and fairly report the allegations in the complaint. Therefore, his publication is not privileged pursuant to 12 O.S.1991 § 1443.1(A). The complaint itself, when compared with Halsne's statements, is evidence from which the jury could find Halsne made false and defamatory statements to third parties about Mitchell and that the statements tended to injure Mitchell in his profession. Halsne's own admission he was familiar with the complaint is clear and convincing evidence from which the jury could find he made the statements with reckless disregard as to their falsity. Because Mitchell put on evidence of malice, he did not need to prove negligence. The statements were defamatory *per se* and not *per quod;* therefore, Mitchell did not need to prove special damages in order to establish liability for slander pursuant to 12 O.S.1991 § 1442(3). This same evidence would support a finding by the jury of each of the elements of a false light invasion of privacy claim.

¶14 The jury's verdict is also supported by the evidence relating to the news stories about Doo Dominate. Mitchell treated Doo Dominate prior to the 1994 All American Futurity race at Ruidoso Downs racetrack in New Mexico. During the race, the horse stumbled and broke both front legs. Track veterinarians euthanized the horse, took blood and urine samples, and removed his front legs for necropsy. Two other horses broke down and were euthanized that day.

¶15 Wayne Conwell, the Medication Manager for the New Mexico State Racing Commission (NMSRC), investigated Doo Dominate's breakdown. He sent the samples for testing and the legs for necropsy. The necropsy report concluded,

> This horse had chronic severe carpal joint disease affecting the left carpus. There were chronic and acute fractures of the radial carpal bone and the 3rd carpal bone in the left carpus.
>
> . . .
>
> In summary, the chronic carpal joint disease in the left carpus appeared severe enough to make this horse unfit for racing. Acute left carpal breakdown may have been responsible for the acute fracture of the cannon bone in the opposite leg.

The laboratory to which Conwell sent the urine sample reported the sample tested positive for mepivacaine, a prohibited pain-killer.[3] The horse's owner exercised his right to send a split sample to an independent laboratory. That laboratory's results failed to confirm the presence of mepivacaine.

¶16 The NMSRC issued a Notice of Contemplated Commission Action against Mitchell, charging him with practicing veterinary medicine in New Mexico without a license and with assisting Doo Dominate's owner and trainer in running an unfit horse. It did not charge him

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[3] At the time of the 1994 race, mepivacaine was prohibited within 72 hours of race day. However, the NMSRC later amended its rules to allow a threshold amount of the drug.

with giving the horse mepivacaine. After a hearing, the NMSRC issued an order finding Mitchell practiced veterinary medicine at Ruidoso Downs without holding a license issued by the New Mexico Board of Veterinary Examiners. It permanently revoked his owner's license.[4] However, the order specifically concluded the evidence was insufficient to prove Mitchell assisted the owner and trainer in running an unfit horse.

¶17 The NMSRC brought a separate action against the owner and trainer for the use of mepivacaine. It later dismissed those charges because the results of the independent laboratory did not confirm the presence of mepivacaine in Doo Dominate's urine sample.

¶18 Halsne said he looked at these documents before airing his report. He testified,

> We were looking for specific documents that support the allegations in front of us about Dr. Mitchell[,] about Doo Dominate. . . . [W]e couldn't read every word of those documents and didn't. We were looking for key pieces that would support our story and maybe shed some light on some areas that didn't support our story. . . .
>
> . . .
>
> [W]e had already done a couple of stories about Dr. Mitchell, and so when we went down we wanted to – I mean our concentration was on ties in [sic] Dr. Mitchell and the death of Doo

[4] The owner's license permitted Mitchell access to the track as a horse owner.

> Dominate and how close those ties were and what they were.

¶19 On February 4 and 5, 1998, KWTV repeatedly aired a promotional tape stating, "You'll be appalled by what racing officials say this vet has done." In the 10:00 p.m. newscast on February 5, 1998, the anchor introduced Halsne's story, stating,

> [A]n Oklahoma veterinarian is the target of a News Nine investigation tonight. Not only is he accused in a federal lawsuit of giving a world-class quarter horse painkillers before a show here, he's also suspected of killing one of the country's top racehorses. . . . Lead investigator, Chris Halsne has discovered that Dr. Mitchell has a troublesome past. . . .

¶20 Halsne then reported,

> [T]his incident isn't the first time Mitchell has been in trouble for his veterinary practices.
>
> Doo Dominate bolted out of Gate 9 during the 1994 All-American Futurity at Ruidoso Downs. One hundred yards from the finish, the powerful colt stumbled, broke both legs, and had to be euthanized. The New Mexico Racing Commission conducted an extensive investigation. An exam afterward showed Doo Dominate competed doped up and with a broken knee.

On March 26, 1998, the anchor introduced another story about Mitchell, stating, "A few months ago a News Nine investigation showed how Mitchell was connected to the doping of a world-class racehorse and a world champion show horse." Halsne then reported on the rescission of Mitchell's Oklahoma racing license.

¶21 This record presents sufficient evidence from which the jury could find Halsne falsely reported the NMSRC found Doo Dominate raced doped-up and Mitchell was linked to the doping. There is evidence Halsne knew the statement was false or acted with reckless disregard of whether it was false or not. A reasonable jury could find the statement injured Mitchell's professional reputation. The statement was not a true and fair report of the NMSRC proceeding and therefore is not privileged pursuant to 12 O.S.1991 § 1443.1(A).

¶22 Accordingly, we hold there was sufficient evidence for the jury to hold KWTV was liable to Mitchell for slander and false light invasion of privacy.

II

¶23 Another group of KWTV's contentions of error relate to the compensatory damages award. KWTV argues (1) the trial court erred in instructing on presumed damages, (2) Oklahoma law does not permit presumed damages in a defamation case against the media even when actual malice is shown, (3) presumed damages can only be nominal, (4) the compensatory damages awarded bear no rational relationship to the demonstrated harm and are so excessive as to shock the conscience, and, as noted in Part I above, (5) Mitchell put on no evidence any harm to his reputation was caused by false statements rather than true ones.

¶24 In *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the United States Supreme Court established the rule requiring proof of actual malice in order for public officials to recover for defamation. It later extended the rule to public figures in *Curtis*

Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Court considered whether to apply the *New York Times* standard to private individuals. It declined to do so, reasoning states have a greater interest in protecting private individuals than public figures from defamation because private individuals have less access to communication channels to counteract false statements and therefore are more vulnerable to injury. *Id.,* 418 U.S. at 344, 94 S.Ct. at 3009. The Court stated,

> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

However, the Court then balanced the media's First Amendment rights against the States' legitimate interest in compensating private individuals for injury to reputation:

> [T]his countervailing state interest extends no further than compensation for actual injury. . . . [W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

418 U.S. at 349, 94 S.Ct. at 3011.[5]

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[5] The Court further explained its holding:

> The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages

(Continued on following page)

without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. . . .

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We need not define 'actual injury,' as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. . . . Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. . . . In short, the private

(Continued on following page)

¶25 The Oklahoma Supreme Court addressed the application of *Gertz* to then-existing Oklahoma law in *Martin v. Griffin Television, Inc.,* 1976 OK 13, 549 P.2d 85. At that time, Oklahoma statutes allowed a presumption of malice from the publication of unprivileged, defamatory matter. The Court held those statutes were unconstitutional under *Gertz* because a presumption of malice allows liability without fault. It then chose negligence as the appropriate standard of liability for the publisher of a defamatory falsehood injurious to a private individual in Oklahoma.

¶26 The Oklahoma Supreme Court also overruled as unconstitutional a statutory section requiring a minimum judgment of one hundred dollars because the statute required no proof as to that minimum amount. It stated, "This is a presumed damage not allowed by *Gertz* without evidence and a finding of actual malice." *Id.* at 93.

¶27 KWTV argues the statute overruled in Martin was the only source of presumed damages in Oklahoma, and no cases following *Martin* have allowed presumed damages. As we discussed in Part I, 12 O.S.1991 § 1442 authorizes actions for slander *per se,* without a showing of actual damage, for false and unprivileged publications falling within the first four sections of the statute. Therefore, the Legislature contemplated presumed damages for slander *per se.* In light of *Gertz,* though, presumed damages are only allowed where actual malice is shown.

> defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury.

418 U.S. at 349-350, 94 S.Ct. at 3011-3012.

¶28 However, the Legislature has set forth an exception to the allowance of presumed damages in 12 O.S.1991 § 1447.3 (emphasis added):

> In any action for damages for any defamatory statement published in or uttered as a part of a television and/or radio broadcast, the complaining party shall be allowed such actual and/or punitive damages *as he has alleged and proved.*

This statute is controlling in the instant case. Damages must be proved, not presumed. The trial court erred in instructing the jury (1) the law presumes Mitchell suffered general damages if he showed KWTV acted with malice, and (2) it may award presumed, general damages without proof of harm. Therefore, the trial court's judgment for compensatory damages is reversed and this matter must be remanded for new trial as to the issue of compensatory damages only.[6] On remand, Mitchell must prove his damages proximately resulted from the defamatory statements, but he is not limited to his out-of-pocket loss. He may recover for loss of profits as well as impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering, subject to proof. *Martin v. Griffin Television, Inc.,* 549 P.2d at 93.

¶29 Because we reverse the trial court's judgment as to compensatory damages, we need not reach KWTV's

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[6] A new trial may be granted on the issue of damages only in cases where it is clear the error in assessing damages did not affect the entire verdict. *Fields v. Volkswagen of America, Inc.,* 1976 OK 106, 555 P.2d 48, 53.

contentions that presumed damages can only be nominal and the verdict was excessive.

III

¶30 KWTV next contends the trial court erred as a matter of law in failing to determine certain statements were not actionable. It argues one group of statements were not actionable because they were not about Mitchell or were not defamatory. In its reply brief, KWTV argues the broadcasts should be viewed as a whole, with the statements considered in context. The gist of the broadcasts as a whole is that Mitchell doped horses to conceal their injuries. The statements in the context of the broadcasts are about Mitchell and are defamatory.

¶31 KWTV argues another group of statements were privileged pursuant to 12 O.S.1991 § 1443.1. As we discussed in Part I, KWTV's statements did not truly and fairly report legal proceedings. Therefore, its statements are not privileged.

¶32 KWTV argues two of the statements were protected opinion. These statements were that the death of one horse was connected to the doping of the other horse and that Mitchell was connected to the doping of both horses. The questions of whether the horses were doped and whether Mitchell was connected to their doping are sufficiently factual to be susceptible of being proved true or false. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21, 110 S.Ct. 2695, 2707, 111 L.Ed.2d 1 (1990). Therefore, the statements are not protected opinion.

IV

¶33 KWTV's next group of contentions relate to jury instructions. In reviewing jury instructions on appeal, we must consider the instructions as a whole. The instructions need not be ideal but must reflect Oklahoma law regarding the subject at issue. The test for error in instructions is whether the jurors were probably misled regarding the legal standards they should apply to the evidence. We will not reverse a judgment based on error in instructing the jury unless it clearly appears the instructions given or refused caused a miscarriage of justice. *King v. Neal,* 2001 OK CIV APP 11, 19 P.3d 899, 902.

¶34 KWTV first argues the trial court erred in refusing to pre-instruct the jury on the elements of Mitchell's claims and on the definition of actual malice, thus allowing the jury to be "infected with prejudicial evidence and argument." Even if pre-instruction would have been helpful, the jurors received the necessary instructions before they began deliberations. We find no error in the trial court's action.

¶35 KWTV next argues the trial court erred in refusing to give constitutionally adequate instructions because it refused to give an instruction regarding what is not actual malice. The jury instructions defining actual malice correctly state Oklahoma law. We are unable to conclude the jurors were probably misled regarding the legal standards they should apply to the evidence.

¶36 KWTV also argues the trial court inadequately defined negligence and direct cause. KWTV fails to support this contention with citations of authority. Accordingly, we will treat it as waived. *Messler v. Simmons Gun Specialties, Inc.,* 1984 OK 35, 687 P.2d 121, 129 n. 11.

¶37 We addressed the trial court's error in instructing on presumed damages in Part II above. KWTV's next contention is the trial court erred in refusing to give special interrogatories to the jury asking which statements it found to be actionable. The Oklahoma Constitution, Art 7, § 15, requires that all jury verdicts be general verdicts. The trial court has discretion to direct special findings. *Id.* We will not reverse a trial court under abuse of discretion unless it made a clearly erroneous conclusion and judgment, against reason and evidence. *Broadwater v. Courtney,* 1991 OK 39, 809 P.2d 1310, 1312. KWTV has failed to show any abuse of discretion in the trial court's refusal to give special interrogatories.

¶ 38 KWTV's last argument regarding jury instructions is the trial court erred in instructing on Category II punitive damages because Mitchell failed to show KWTV acted with malice. As we discussed in Part I, Mitchell put on evidence from which the jury could find malice. Therefore, the trial court properly instructed the jury on Category II punitive damages pursuant to 23 O.S.Supp.1995 § 9.1(C).[7]

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[7] 23 O.S.Supp.1995 § 9.1(C) provides,

Category II. Where the jury finds by clear and convincing evidence that:

1. The defendant has acted intentionally and with malice towards others; . . .

the jury, in a separate proceeding conducted after the jury has made such finding and awarded actual damages, may award exemplary damages in an amount not to exceed the greatest of:

a. Five Hundred Thousand Dollars ($500,000.00),

(Continued on following page)

¶39 The jury awarded punitive damages of $250,000.00 against each defendant. This award would be within the statutory limit set forth for Category II punitive damages regardless of the amount of compensatory damages awarded on remand. However, should the jury and trial court find no actual damages on remand, the punitive damages award must be vacated because § 9.1(C) requires an award of actual damages before punitive damages may be awarded. Accordingly, we do not reverse the award of punitive damages, but instruct the trial court to vacate the punitive damages award in the event there is no award of compensatory damages on remand.

V

¶40 KWTV's last group of contentions relate to evidentiary rulings. It asserts the trial court made three errors in admitting Mitchell's evidence, but fails to show how the admission of the evidence affected a substantial right. It argues the trial court improperly excluded testimony from two of its witnesses, but fails to show how that evidence would tend to make the existence of a material fact more or less probable. Therefore, we may not predicate any reversible error upon the trial court's evidentiary rulings. 12 O.S.1991 §§ 2104(A), 2401, and 2402.

¶41 For the foregoing reasons, the judgment of the trial court is AFFIRMED to the extent it found KWTV liable to

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b. twice the amount of actual damages awarded, or

c. the increased financial benefit derived by the defendant or insurer as a direct result of the conduct causing the injury to the plaintiff and other persons or entities.

Mitchell for slander and false light invasion of privacy and awarded punitive damages. It is REVERSED to the extent it awarded compensatory damages. This matter is REMANDED for new trial on the issue of compensatory damages only. The trial court is instructed to vacate the punitive damages award in the event there is no award of compensatory damages on remand.

¶42 The motion of The Reporters Committee for Freedom of the Press and others for leave to file an amicus curiae brief in this appeal was filed after the normal briefing cycle set for the party to be supported. Because the amici have failed to show the requisite extraordinary cause for leave to file their brief, their motion is denied.

¶43 AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

ADAMS, J. AND MITCHELL, J., CONCUR.

APPENDIX B

IN THE DISTRICT COURT OF CREEK COUNTY
STATE OF OKLAHOMA
BRISTOW DIVISION

H.L. MITCHELL, D.V.M., an individual,	)	
Plaintiff,	)	
vs.	)	Case No. CJ-99-16-B
GRIFFIN TELEVISION, L.L.C., an Oklahoma corporation, and CHRIS HALSNE, an individual,	)	(Judge Joe Sam Vassar)
Defendants.	)	

JURY INSTRUCTIONS

* * *

INSTRUCTION NO. 9

In order for the Plaintiff to recover on his defamation claim, he must prove by a greater weight of the evidence each of the following things:

1. That the Defendants published a defamatory statement or statements about him;

2. That the statement was false and made the substance of the charge complained of by Plaintiff substantially false;

3. That the Defendants were negligent or acted in reckless disregard with respect to the truth of the statement that was broadcast; and

4. That the false and defamatory statement directly caused injury to his reputation.

The parties agree that Defendants published statements about the Plaintiff.

Unless the plaintiff proves all these things, your verdict must be for the Defendants.

Some of the terms I have used to describe the elements of the Plaintiff's claim have a specific meaning in the law, so I will define them for you.

* * *

INSTRUCTION NO. 20

If you find in favor of Plaintiff and that the Defendants (1) knew at the time of the broadcast that a defamatory statement about the Plaintiff was in fact false or (2) had at the time of the broadcast a high degree of awareness of the probable falsity or entertained serious doubts about the truth of the statements which you find to be false, then you may award him general damages. These are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include but are not limited to, reasonable compensation for loss of personal or professional reputation, shame, mortification, and hurt feelings. No definite method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages and no evidence of actual harm is required. In making an award for presumed damages you should exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable.

* * *

INSTRUCTION NO. 24

If you find that the Defendants defamed and/or caused Dr. Mitchell to be placed in false light, then you shall complete verdict form number 1.

If you find that Dr. Mitchell has failed to prove that the Defendants defamed him and failed to prove that Defendants placed him in a false light, then you shall complete verdict form number 2.

If you find in favor of Dr. Mitchell, and grant him actual damages, then you must also find whether the Defendants acted with reckless disregard for the truth as that term has been defined for you.

The Plaintiff has the burden of proving this by clear and convincing evidence.

If you find by clear and convincing evidence that either or both of the Defendants acted in reckless disregard for the truth, you may award punitive damages against such Defendant(s) in a later part of this trial. If you find that the Defendant(s) did not act in reckless disregard for the truth, you may not award punitive damages against the Defendant(s).

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Thursday, June 27, 2002

(Filed Jun. 27, 2002)

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

* * *

96,640 H. L. Mitchell v. Griffin Television, L.L.C. and Chris Halsne. **Corrected reply brief was accepted June 20, 2002. Brief in violation of length requirements filed May 20, 2002 is stricken and replaced by corrected brief.**

* * *

/s/ Rudolph Hargrave
CHIEF JUSTICE

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

H. L. MITCHELL, **Plaintiff/Appellee,** **v.** **GRIFFIN TELEVISION, L.L.C., an Oklahoma corporation, and CHRIS HALSNE, an individual,** **Defendants/Appellants.**	**No. 96,640**

REPLY BRIEF OF APPELLANTS (CORRECTED)

Appeal from the District Court of Creek County
Honorable Joe Sam Vassar, CJ-99-16-B
Defamation

Robert D. Nelon, OBA #6610
Jon Epstein, OBA #13274
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON
100 North Broadway
Bank One Center, Suite 2900
Oklahoma City, OK 73102-8865
Telephone (405) 553-2828
Facsimile (405) 553-2855

ATTORNEYS FOR APPELLANTS

June 20, 2002

* * *

I. The plaintiff did not prove actual malice clearly and convincingly.

Proof of actual malice must be clear and convincing. *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991); *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964); *Herbert v. Oklahoma Christian Coalition, Inc.*, 1999 OK 90, ¶¶ 16, 18; 992 P.2d 322, 328. Whether the record is sufficient to show actual malice is a question of law. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685 (1989); *Herbert*, 1999 OK 90, ¶ 18, 992 P.2d at 328; *Gaylord Entertainment Co. v. Thompson*, 1998 OK 30, 958 P.2d 128. "[A]n appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984); *Herbert*, 1999 OK 90, ¶ 18, 992 P.2d at 328. *Accord: Harte-Hanks*, 491 U.S. at 688 ("[T]he reviewing court must 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect[.]'") (citations omitted). Mitchell did not, as a matter of law, prove actual malice clearly and convincingly.

* * *

KWTV's characterization of Mitchell's role in the death of Doo Dominate is a rational interpretation of ambiguous events, and reckless disregard of the truth cannot be inferred because the publisher proposes an interpretation of events different from that favored by the

plaintiff. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 519 (1991) ("The protection for rational interpretation serves First Amendment principles by allowing an author the interpretive license that is necessary when relying upon ambiguous sources."); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984) (no reckless disregard where report was but " 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges for the writer."); *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971) ("The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of 'malice' under *New York Times*."). *See also Henslee v. Monks*, 1977 OK 202, 571 P.2d 440 (in reporting accusations that police chief had possibly obstructed justice by agreeing with ranchers to allow them to hire illegal aliens, reporter's failure to understand legal distinctions between hiring and harboring aliens was not reckless disregard).

* * *